

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 156/2021 OF 20th DECEMBER 2021

BETWEEN

ISOLOOK LIMITED APPLICANT

AND

**DEPUTY COUNTY COMMISSIONER - KISUMU WEST
SUB-COUNTY, MINISTRY OF INTERIOR &
CO-ORDINATION OF NATIONAL GOVERNMENT RESPONDENT**

Review against the decision of the Deputy County Commissioner - Kisumu West Sub-County, Ministry of Interior & Co-ordination of National Government in relation to Tender No: KSM-WEST/DCC/D1021/2021 for Completion of Kisumu West Sub County Office Buildings.

BOARD MEMBERS

- | | |
|--------------------------|---------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Mr. Steven Oundo, OGW | - Member |
| 3. Mr. Hussein Were | - Member |
| 4. Ms. Njeri Onyango | - Member |
| 5. Dr. Joseph Gitari | - Member |

IN ATTENDANCE

Mr. Philip Okumu

- Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Kisumu West Sub County, Ministry of Interior & Coordination of National Government (hereinafter referred to as the 'Procuring Entity') invited sealed tenders from qualified and eligible tenderers who were pre-qualified contractors/suppliers for Tender Number: KSM-WEST/DCC/D1021/2021-2022 for Completion of Kisumu West Sub-County Office Buildings (hereinafter referred to as the 'subject tender') by way of restricted tendering method.

Tender Submission deadline and Opening of Tenders

The deadline for submission of tenders was on 3rd December 2021. By the tender submission deadline, the Procuring Entity received seven (7) tenders. Tenders were opened shortly thereafter by a Tender Opening Committee in the presence of tenderers' representatives and the following tenderers were recorded as having submitted their tenders in good time: -

1. Stepex Limited;
2. Isolook Enterprises Ltd;
3. Ambe General Merchant Limited;
4. Belafast Holdings Limited;
5. Precision Construction & Gen. Supplies;
6. Checkmate Global Merchants Ltd; and

7. Strevlan Ltd

Evaluation of tenders

The Procuring Entity's evaluation committee (hereinafter referred to as the 'Evaluation Committee') noted that despite the subject tender being a restricted tender for participation by 10 (ten) pre-qualified contractors/suppliers, four (4) out of the seven (7) tenderers were not among the list of 10 (ten) pre-qualified contractors/suppliers. The four (4) tenderers who were not among the list of 10 (ten) pre-qualified contractors/supplies were:

1. Isolook Enterprises Ltd (the Applicant herein);
2. Belafast Holdings Limited;
3. Precision Construction & Gen. Supplies; and
4. Strevlan Ltd

The evaluation committee failed to agree on how to deal with tenderers who were not in the list of the ten (10) prequalified contractors/suppliers.

Professional Opinion

In a professional opinion dated 7th December 2021, the Procuring Entity's Supply Chain Management Officer, Mr. Meshak Henry Otieno, recommended for cancellation of the procurement proceedings for the subject tender on grounds that the same was marred with irregularities and for the

procurement process to start afresh. The Respondent approved the said professional opinion on 3rd December 2021.

Notifications

Vide letters dated 7th December 2021, the Senior Deputy County Commissioner notified tenderers of the cancellation of the subject tender due to non-compliance with the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act) under Section 63(1) of the Act and the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020').

Notification to the Director-General of the Public Procurement Regulatory Authority

the Senior Deputy County Commissioner wrote a letter dated 7th December 2021 whose contents were informing the Director-General of the Public Procurement Regulatory Authority (hereinafter the 'Director General of the Authority').

REQUEST FOR REVIEW NO.155 OF 2021

Isolook Limited, the Applicant herein, lodged a Request for Review dated 17th December 2021 and filed on 20th December 2021 together with a Statement in Support of the Request for Review signed by Elizabeth Otieno

on 17th December 2021 through the firm of Owiti, Otieno & Ragot Advocates, seeking the following orders:

- a) **The decision of the Respondent contained in the letter dated 7th December 2021 cancelling the subject Tender be declared illegal, null and void.**
- b) **The Respondent be ordered to complete the subject tender in the manner prescribed by law and to declare an award.**
- c) **The Applicant be awarded cost of these proceedings.**

Vide a Notification of Appeal and a letter both dated 20th December 2021, the Acting Board Secretary notified the Respondent of the existence of the Request for Review and suspension of procurement proceedings for the subject tender, while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020 detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents pursuant to Section 67(3)(e) of the Act with respect to the subject tender within 5 days from 20th December 2021.

The Respondent filed his memorandum of response to the Request for Review dated 3rd January 2022 on 4th January 2022 through the Senior Deputy County Commissioner, Kisumu West Sub County one Mr. Maurice Nalyanya Wanyonyi.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

None of the parties herein filed any written submissions.

APPLICANT'S CASE

The Applicant avers that the Senior Deputy Commissioner, Kisumu West Sub – County in the Ministry of Interior & Co-ordination of National Government invited tender under the subject tender by properly advertising the same. In an attempt to prove this, the Applicant annexed a copy of an advertisement marked 'A' to its Statement in Support of the Request for Review which shows the deadline for submission of tender was scheduled for 29th November 2021.

Thereafter, the Applicant alleges that it obtained the Tender Document at Kshs.2,000/= and proceeded to prepare and submit its tender in accordance with the instructions while quoting Kshs.26,207,860/=. In an attempt to prove this, the Applicant annexed a copy of a Receipt No. 1604001 dated 18th November 2021 marked 'B' to its Statement in Support of the Request for Review.

It is the Applicant's averments that its tender sailed through the first phases of the process having met all requirements but was surprised to receive a letter dated 7th December 2021 from the Respondent purporting to terminate or cancel the procurement process on account of non-compliance with the Act under Section 63(1) of the Act and Regulations 2020.

The Applicant is aggrieved with this decision of the Respondent on the basis that none of the factors set out in Section 63 of the Act were present to warrant termination or cancellation of the subject tender's procurement proceedings and but rather, the termination/cancellation appeared to be motivated by some mischief, thus irregular, illegal, null and void.

It is the Applicant's averment that the reason given for termination of the subject tender's procurement proceedings are vague and there is no evidence of non-compliance with the law in the subject tendering process.

Further, the Applicant avers that, cancellation of the subject tender's procurement proceedings will cause it a major loss and damage aside from being a waste or misuse of public resources.

Consequently, the Applicant prays for, *inter alia*, the termination/cancellation of the subject tender's procurement process to be nullified and for the Respondent to be ordered to complete the procurement process as provided in law.

RESPONDENT'S RESPONSE

The Respondent confirms having initiated the tendering process for the subject tender on 14th September 2021 and subsequently, the process of tendering agreed upon was restricted tendering and only open to pre-qualified contractors forwarded to the Respondent by the Regional Works Officer.

Vide a letter Ref.KW/PW.2/2VOL.1/161 dated 21st October 2021, which letter was attached to the Respondent's Memorandum of Response, the Respondent requested for a list of ten (10) pre-qualified contractors from the Regional Works Officer who would be invited to bid for the subject tender. Vide a letter Ref. RWN/D1021/DCC KSM WEST/3/2021 dated 28th October 2021, the Regional Works Officer, Nyanza Region, forwarded to the Respondent a list of ten (10) NCA registered firms.

According to the respondent, the head of procurement unit was mandated to invite tenderers as per Tender Documents prepared by the Regional Works Officer and in accordance with the list of ten (10) pre-qualified NCA registered contractors. all the contractors as per the submitted list by the Regional Works Officer.

The Respondent contends that as accounting officer of the Procuring Entity, he terminated the subject tender's procurement proceedings on account of material governance issue detected. To support the reason for termination, the Respondent contends that the Applicant was among other four tenderers who participated in the subject tender yet was not in the list of the ten (10)

prequalified NCA registered contractors. According to the Respondent, it is evident that there must have been collusion between the Applicant and the head of supply chain management unit at Sub-County level and the process was riddled with corruption, canvassing and collusion necessitating the termination of the subject tender's procurement proceedings.

The Respondent contends that administrative action has been recommended against the officer responsible for subverting the process of tendering.

Based on the reasons set hereinbefore, the Respondent contends that he is not obligated to progress with the process to the end and award the tender as per the Applicant's prayers since the process was marred with a lot of irregularities and questions how the Applicant was aware that its tender went through the first stage of evaluation which is an indication of collusion between the Applicant and some members of the Evaluation Committee which action is prohibited under Section 65(1) of the Act and Section 67(1) of the Act.

Consequently, it is the Respondent's prayer that the Request for Review be dismissed with costs, the Respondent be allowed to continue with the freshly initiated tendering process and the Applicant be severely reprimanded for breaching the rule of confidentiality by canvassing with some members of the evaluation committee and staff within the procurement unit.

BOARD'S DECISION

The Board has considered each of the parties' cases, pleadings filed before it including confidential documents submitted to it pursuant to Section 67 (3) (e) of the Act and notes the following issue calls for determination:-

Whether the Procuring Entity terminated or cancelled the procurement proceedings in the subject tender in accordance with Section 63 of the Act.

Termination of procurement proceedings is governed by Section 63 of the Act. In addition to this, it is only when such termination meets the threshold of Section 63 of the Act that the jurisdiction of this Board is ousted by section 167 (4) (b) of the Act.

The Court in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute** (2018) eKLR (hereinafter referred to as "JR No. 142 of 2018") held as follows regarding the extent of jurisdiction of this Board when termination of procurement proceedings exists:-

"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the

Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement...

A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with Section 63 of the Act is not subject to review. Therefore, there is a statutory pre- condition that first needs to be satisfied in the said sub- section namely that the termination proceedings are conducted in accordance with the provisions of Section 63 of the Act, and that the circumstances set out in Section 63 of the Act were satisfied, before the jurisdiction of the Respondent can be ousted...

The Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory preconditions leading to termination of procurement proceedings were satisfied..."

The Court in JR No. 142 of 2018 held that this Board has jurisdiction to determine whether the statutory pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process.

Section 63 (1), 2, 3 and 4 of the Act states as follows: -

"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel

procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement have been overtaken by-

- (i) operation of law; or***
- (ii) substantial technological change;***

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.

The statutory pre-conditions for termination or cancellation of procurement proceedings are twofold. Substantive and Procedural. The substantive statutory pre-conditions are the reasons that give rise to a termination or cancellation of procurement proceedings. These reasons are enumerated in Section 63(1) of the Act. The procedural statutory pre-conditions are contained in Section 67(2), (3) and (4) of the Act.

We find, for a termination or cancellation of procurement proceedings to be lawful, there must be a reason giving rise to such termination or cancellation as provided in Section 63(1) of the Act and such termination is conducted in accordance with the procedure provided in Section 67(2), (3) and (4) of the Act.

It is therefore important for us to determine the legality, or lack thereof, of the Respondent's decision to terminate the subject tender's procurement proceedings, which determination can only be made by interrogating the reason cited for termination.

The Applicant received a letter dated 7th December 2021 from the Senior Deputy County Commissioner, Kisumu West Sub County with respect to the subject tender which letter reads in part as follows :-

"The above captioned tender KSM-WEST/DCC/D1021/2021-2022 for completion of Kisumu West Sub-County has been cancelled due to non-compliance with the Public Procurement and Disposal Act 2015 section 63(1) and the Regulations 2020.

Fresh tender documents will be issued to the bidders who will be invited to tender.

....."

Further to this, a letter dated 7th December 2021 written by the Senior Deputy County Commissioner, Kisumu West Sub was addressed to the Director General of the Authority which reads in part as follows:-

"The above captioned tender KSM-WEST/DCC/D1021-2022 for completion of Kisumu West Sub-County has been cancelled due to

non-compliance with the Public procurement and Disposal Act 2015 as per section 63(1) and the accompanying Regulations due to the following reasons

- i) The Tender was restricted but some contractors who had not been invited to bid were sneaked in***
- ii) The evaluation committee failed to agree on how to handle the bidders who were not invited to bid***
- iii) There was no confidentiality among the Evaluation committee members***
- iv) There was some political influence to the process***

For these reasons the tendering process failed to meet the minimum legal requirements and therefore had to be terminated and start it again.

.....”

From the foregoing, the Board notes, the Respondent terminated the subject tender's procurement proceedings because some of the tenderers who participated in the subject tender, and which was a restricted tender, had not been invited to tender and for non-compliance with the Act and Regulations 2020 among other reasons.

The Applicant has challenged the termination of the subject tender's procurement proceedings on the basis that there is no evidence of non-compliance with the Act or Regulations as alleged by the Respondent in the letter of termination dated 7th December 2021 and in any case non-compliance with the law is not a reason for which a tendering process can be terminated under Section 63 of the Act. The Applicant alleges that the tender was properly advertised sometime in November 2021 and that it purchased the Tender Document, prepared and submitted its tender as instructed with a quote of Kshs.26,207,860/=. Annexure marked A and B to the Applicant's statement in support of the request for review is a copy of an Invitation To Tender showing the tender submission deadline was set for 29th November 2021 and a copy of a receipt for Kshs.2,000/-.

In response to the Applicant's allegations, the Respondent contends that restricted tendering method was used for the subject tender where the Respondent, upon his request, was furnished with a list of ten (10) prequalified NCA registered contractors by the Regional Works Officer, Nyanza Region vide a letter dated 28th October 2021. The said letter dated 28th October 2021 reads as follows in part:

"Forwarded herewith, please find the tender document for the above works and the list of Ten (10No.) NCA registered firms for your approval as per PPDA 2015.

LIST OF NCA REGISTERED FIRMS

S/No.	FIRM NAME	POSTAL ADDRESS	NCA CATEGORY
1	M/S. AMBE GENERAL MERCHANTS LTD	.....	.....
2	M/S. CHECKMATE GLOBAL MERCHANTS LTD	.....	.....
3	M/S. PACHODOMS CONSTRUCTION LTD	.....	.....
4	M/S. FINETOPS ENTERPRISES	.....	.....
5	M/S. NYOBU ENTERPRISES LTD	.....	.....
6	M/S. STEPEX LTD	.....	.....
7	M/S. CRINON CONSTRUCTION COMPANY LTD	.....	.....
8	M/S. ELIMOS INVESTMENT CO. LTD
9	M/S. LE BRILLIANCE ENTERPRISES LTD

10	M/S. NEOSCAPE ARCH. SYSTEMS LTD
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According to the Respondent, the Applicant was not among the list of ten (10) prequalified NCA registered contractors who ought to have been invited for the subject tender. The Respondent has attached to its memorandum of response an Invitation To Tender which shows the subject tender was scheduled to close on 3rd December 2021 and not 29th November 2021 as seen in the invitation to tender annexed and marked 'A' in the Applicant's statement in support of the request for review. What we understand the Respondent to say, is that, only the above listed ten (10) pre-qualified NCA registered contractors were to be invited to participate in the subject tender which was by way of restricted tendering method and not open tendering method.

Indeed as observed in the Tender Opening Minutes forming part of the confidential documents submitted to the Board by the Respondent, the subject tender closed and opened on 3rd December 2021 and not 29th November 2021. No evidence has been adduced to imply an addendum was issued to change/amend the tender submission deadline from 29th November 2021 to 3rd December 2021.

In the absence of such an addendum, we find the invitation to tender annexed and marked 'A' in the Applicant's statement in support of the request for review cannot have been with respect to the subject tender and it is not clear how the Applicant obtained the Tender Document of the subject tender pursuant to an invitation to tender with a tender submission deadline of 29th November 2021 yet the subject tender's Invitation To Tender provided for the tender submission deadline of 3rd December 2021.

This, in our considered view, amounts to misconduct and malpractice on the part of the Procuring Entity's officers who provided the Applicant with the Tender Document for the subject tender when the Applicant was in fact not eligible to tender in the subject tender because it was not among the list of ten (10) pre-qualified NCA registered contractors to be invited to tender.

We observe, in a Professional Opinion dated 7th December 2021, which document forms part of the confidential documents, the Supply Chain Management Officer of the Procuring Entity one Mr. Meshack Henry Otieno, opined that the tender process for the subject tender was marred with irregularities citing one of the irregularity as detection of four (4) tenderers who had not been invited to tender in the subject tender and recommended cancellation of the subject tender's procurement proceedings and starting afresh. It is for this reason that the Respondent has in its memorandum of

response cited material governance issues detected as a reason for termination of the subject procurement proceedings.

To understand what material governance is, the Board first will interpret the word "governance" and how it relates to public procurement. The Cambridge Dictionary of English defines "governance" as:-

"the way that organizations or countries are managed at the highest level, and the systems for doing this"

According to the United Kingdom Department for International Development (DFID) (2001), governance is:-

"how institutions, rules and systems of the executive, legislature, judiciary and military operate at central and local level and how the state relates to individual citizens, civil society and the private sector"

On governance and how it relates to public procurement the book **"Public Procurement: International Cases and Commentary, (2012) edited by Louise Knight**, et al, explains as follows:-

"Effective procurement practices provide governments with a means of bringing about social, economic and environmental reform. Conversely, malpractice within public procurement demonstrates a failure of governance and typically arises from corruption and fraud"

From the above definition, we note, the principles of governance dictate that a procuring entity and tenderers avoid any form of malpractice that compromise a procurement process leading to failure of good governance practices. Our understanding of malpractice is a dereliction of professional duty, an improper, illegal or negligent professional behavior.

Principles of governance that bind public procurement are explained in the Constitution, some of which include the following:-

"Article 10 (2) (c): The national values and principles of governance include:-... good governance, integrity, transparency and accountability

Article 201 (d) The following principles shall guide all aspects of public finance in the Republic:-... public money shall be used in a prudent and responsible way

Article 227 (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a

system that is fair, equitable, transparent, competitive and cost-effective."

The Cambridge Dictionary of English defines "***material***" as "***significant, major, important, of consequence, consequential***".

Therefore, material governance issues as they relate to a procurement process that would give rise to a termination of procurement proceedings, are significant issues detected by a procuring entity, for example, misconduct, malpractice, corruption, fraud and collusive tendering during the procurement process, that are contrary to the principles of governance and national values under the Constitution.

Consequently, when such material governance issues are detected, the accounting officer may exercise his discretion to terminate procurement proceedings citing Section 63(1)(e) of the Act. With this, we agree with the Respondent that the action of four (4) tenderers participating in a restricted tender in which such tenderers were not invited because they were not in the list of the ten (10) prequalified NCA contractors amounts to material governance issues being detected. To this end and extent, the Respondent satisfied the substantive statutory pre-condition for termination of procurement proceedings under Section 63(1)(e) of the Act.

However, we note the Respondent did not satisfy the procedural statutory pre-conditions for termination of procurement proceedings under Section 63(2) and (4) of the Act.

We say so because, first, even though there is a letter dated 7th December 2021 addressed to the Director General of the Authority as a report on termination, there is no proof that the said letter was actually delivered and received by the Director General of the Authority to satisfy Section 63(2) of the Act.

Secondly, the letters of termination issued to tenderers, such like the Applicant, provided a vague reason for termination instead of laying down the specific reason, being material governance issues have been detected following detection of some tenderers having participated in the subject tender without being invited to participate in the same because of not being among ten (10) prequalified NCA registered contractors.

The requirement for specific reason for termination to be given to tenderers under Section 63(4) of the Act is inline with promotes the right to fair administrative action provided under Article 47 of the Constitution which states that:-

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"

Even though the Respondent was justified to terminate the subject tender's procurement proceedings under Section 63(1)(e) of the Act having detected material governance issues in the subject procurement process, the Respondent failed to comply with the procedural statutory pre-condition outlined in Section 63(2) and (4) of the Act.

In the circumstances, we find the Respondent did not terminate the subject tender's procurement proceedings in accordance with law as outlined hereinbefore and such termination is thus null and void to the extent that it does not comply with Section 63(2) and (4) of the Act.

Given the foregoing, it is just for this Board to nullify the purported termination of the subject tender's procurement process and allow the Respondent to terminate the procurement proceedings of the subject tender in accordance with Section 63 of the Act.

In totality of our findings, the Request for Review succeeds in terms of the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review dated 17th December 2021:-

- 1. The Letter of Termination of procurement proceedings in Tender No: KSM-WEST/DCC/D1021/2021 for Completion of Kisumu West Sub County Office Buildings dated 7th December 2021 addressed to the Applicant and all other tenderers, be and is hereby cancelled and set aside.**

- 2. The Letter of Termination of procurement proceedings in Tender No: KSM-WEST/DCC/D1021/2021 for Completion of Kisumu West Sub County Office Buildings dated 7th December 2021 addressed to the Director General of the Public Procurement Regulatory Authority dated 7th December 2021, be and is hereby cancelled and set aside.**

3. The Respondent is at liberty to terminate the procurement proceedings of Tender No: KSM-WEST/DCC/D1021/2021 for Completion of Kisumu West Sub County Office Buildings in accordance with Section 63 of the Act taking into consideration the findings of the Board in this review.

Dated at Nairobi this 10th day of January, 2022.



.....
CHAIRPERSON

PPARB



.....
SECRETARY

PPARB